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UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 THOMAS VINCENT GIRARDI,

17 Defendant.

No. CR 23-47-JLS-1

GOVERNMENT'S TRIAL MEMORANDUM

Trial Date: August 6, 2024

Trial Time: 8:30 a.m.

Location: Courtroom of the
Hon. Josephine L.
Staton

19 Plaintiff United States of America, by and through its counsel
20 of record, the United States Attorney for the Central District of
21 California and Assistant United States Attorneys Scott Paetty and Ali
22 Moghaddas, hereby files its trial memorandum.

23 //

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TRIAL MEMORANDUM

I. STATEMENT OF THE CHARGES

Defendant Thomas Vincent Girardi is charged in the indictment with a scheme to defraud former clients of the Girardi Keese law firm through the misappropriation of settlement funds in a fraud scheme dating back to at least 2010.¹ The government's case focuses on four client victims that are identified in the indictment. (Dkt. 1.)

A. Summary of the Scheme To Defraud and the Victims

Defendant Girardi's scheme involved the years-long misappropriation and embezzlement of millions of dollars from client trust accounts at the former law firm Girardi Keese. Specifically, the scheme involved defendant Girardi stealing millions of dollars in client settlement funds and failing to pay Girardi Keese clients the money that was due them. In carrying out this scheme, defendant provided a litany of false excuses for failure to pay clients and co-defendant Kamon aided and abetted the scheme by transferring client funds at defendant Girardi's direction to pay previously defrauded clients or other unrelated expenditures. The scheme involved, among other things, the four client matters below:

1. Clients Defrauded

"Client 1" lived in San Bruno, California. Beginning in October 2010, defendant Girardi and Girardi Keese had a formal attorney-client relationship with Client 1 and represented him in connection with a lawsuit against a public utility related to significant

¹ Co-defendant Christopher Kamon ("Kamon") has been severed for trial. The parties will be filing a stipulation to continue that trial date to January 21, 2025.

1 injuries Client 1 sustained as a result of an explosion that caused
2 severe burns all over his body.

3 "Client 2" lived in Lake Havasu City, Arizona. Beginning in May
4 2019, defendant Girardi and Girardi Keese had a formal attorney-
5 client relationship with Client 2 in connection with potential
6 litigation related to a boating accident as a result of which Client
7 2's husband died.

8 "Client 3" lived in Castaic, California. Beginning in
9 approximately 2014, defendant Girardi and Girardi Keese had a formal
10 attorney-client relationship with Client 3 in connection with a
11 lawsuit against a medical device provider related to severe injuries
12 that Client 3 sustained as a result of a defective medical device.

13 "Client 4" and "Client 5" lived in Los Angeles, California.
14 Beginning in December 2019, defendant Girardi and Girardi Keese had a
15 formal attorney-client relationship with Client 4 and Client 5
16 representing the two in connection with a lawsuit related to injuries
17 Client 4, Client 5, and their minor son, sustained in an automobile
18 collision.

19 As part of the scheme and to conceal the embezzlements and
20 misappropriations from the victim clients, defendant Girardi sent
21 lulling communications to the clients that, among other things,
22 falsely denied that the settlement proceeds had been paid and falsely
23 claimed that Girardi Keese could not pay the settlement proceeds to
24 clients until certain purported requirements had been met, such as
25 addressing supposed tax obligations, settling bankruptcy claims,
26 obtaining supposedly necessary authorizations from judges, and
27 satisfying other debts.

1 2. Illegitimate Expenses and Evidence of Misappropriation

2 During the same timeframe as the charged conduct in this case,
 3 defendant Girardi diverted tens of millions of dollars from the
 4 Girardi Keese operating account to pay illegitimate expenses,
 5 including over \$25 million to pay the expenses of EJ Global, a
 6 company formed by his spouse related to her entertainment career, as
 7 well as spent millions of dollars of Girardi Keese funds on private
 8 jet travel, jewelry, luxury cars, and exclusive golf and social
 9 clubs. Meanwhile, co-defendant Kamon was separately, unbeknownst to
 10 defendant Girardi, funneling millions of dollars from the Girardi
 11 Keese operating accounts to accounts that he controlled for his own
 12 personal enrichment. At the end of 2020, as defendant and his law
 13 firm faced mounting legal problems related to his years'-long theft
 14 of funds, Girardi Keese was forced into involuntary bankruptcy.

15 **B. The Statutes and Elements²**

16 Wire Fraud (Counts 1-4)

17 The elements of the offense charged in Counts 1-4, i.e., wire
 18 fraud, in violation of 18 U.S.C. § 1343, are as follows:

19 1. The defendant knowingly participated in or devised a scheme
 20 or plan to defraud, or a scheme or plan for obtaining money or
 21 property by means of false or fraudulent pretenses, representations,
 22 promises, or omitted facts. Deceitful statements of half-truths may
 23 constitute false or fraudulent representations;
 24
 25
 26

27
 28 ² Pursuant to the Court's order the parties have filed joint
 proposed and joint disputed instructions, including instructions on
 the charged offenses. (Dkt. 310.)

1 2. The statements made or facts omitted as part of the scheme
2 were material; that is, they had a natural tendency to influence, or
3 were capable of influencing, a person to part with money or property;

4 3. The defendant acted with the intent to defraud, that is,
5 the intent to deceive and cheat; and

6 4. The defendant used, or caused to be used, an interstate or
7 foreign wire communication to carry out or attempt to carry out an
8 essential part of the scheme.

9 Ninth Circuit Model Criminal Jury Instructions, No. 8.124 (Wire
10 Fraud).

11 **II. TRIAL**

12 **A. Length of Trial**

13 The government expects that its case-in-chief will take five to
14 seven days, including cross-examination. The parties have
15 represented to the Court that the trial will take no more than 12
16 court days.

17 **B. Witnesses**

18 The government presently intends to call the following witnesses
19 in its case-in-chief:

- 20 1. Joseph Ruigomez
- 21 2. Kathleen Ruigomez
- 22 3. Kimberly Archie
- 23 4. Kim Cory
- 24 5. Judy Selberg
- 25 6. Eric Seuthe
- 26 7. Alexa Galloway
- 27 8. Norina Rouillard
- 28 9. Josephina Hernandez

10. Arin Scapa

11. Shirleen Fujimoto

12. Erika Saldana

13. John Abassian

14. Kathy Marlatt

15. IRS Special Agent Ryan Roberson

Rebuttal

16. Dr. Ryan Darby

The government reserves the right to call additional witnesses, including additional rebuttal witnesses, as necessary.

C. Exhibits and Stipulations

The government's exhibits consist primarily of Girardi Keese business records (including client files and law firm emails), bank records, and other documents related to the four charged victim clients. The parties have filed a stipulation (Dkt. 311), summarized below, regarding the admissibility of the majority of these exhibits.

- The parties agree that records produced to any party by Elisa Miller, including any of her agents (the "trustee"), are authentic and admissible at trial against a hearsay exception (but all sides retain the right to object under Rules 401 and 403), such as: bank records, Girardi Keese email communications, and other spreadsheets and financial data gathered and/or created at the trustee's direction;
- the parties agree that the following categories of documents related to the four client matters charged in the Indictment are authentic and admissible at trial against a hearsay objection (but all sides retain the

1 right to object under Rule 401 and 403): retainer
2 agreements, settlement agreements, consents, client
3 correspondence, correspondence with the client's later
4 representatives, internal memoranda, and court filings.
5 (The stipulation reflects defendant Girardi's
6 preservation of his objection to evidence of client
7 injuries despite the Court's ruling that such evidence is
8 admissible);

- 9 • The parties agree that all of the above evidence agreed
10 to as authentic and admissible through this stipulation
11 may be introduced and admitted into evidence at trial at
12 any time without laying foundation for a particular
13 exhibit's authenticity or admissibility. By entering
14 into this stipulation, the parties do not intend to
15 suggest that other evidence unaddressed by the
16 stipulation is not admissible, only that pretrial
17 admissibility has not yet been agreed upon;
- 18 • The parties agree that each wire alleged in Counts One
19 through Four of the Indictment is a wire communication
20 that was used, or caused to be transmitted, in interstate
21 commerce;
- 22 • The government has agreed to make its investigating
23 federal agents available to the defense during the
24 defense case-in-chief without need for trial subpoenas.
25 This includes federal agents from both the FBI and the
26 IRS, and in both this district and the Northern District
27 of Illinois.

1 **D. Pretrial Motions**

2 The Court has ruled on all motions in limine and on two
3 additional ex parte applications related to the scope of the evidence
4 in the trial of defendant Girardi.³ In sum, the Court has:

- 5 • Denied the government's motion to exclude the testimony of
6 Dr. Helena Chui. (Dkt. 235.)
- 7 • Denied defendant Girardi's ex parte application to exclude
8 the testimony of Dr. Ryan Darby. (Dkt. 303.)
- 9 • Denied the government ex parte application to exclude
10 evidence of Kamon's side fraud charged in CR-23-24-JLS and
11 Kamon's flight from prosecution. (Dkt. 302; Dkt. 289 at 6-
12 8.)
- 13 • Denied defendant Girardi's motion to exclude evidence of
14 client injuries to the extent such evidence appears in the
15 Government's exhibits, references financial consequences
16 and client losses but limited testimony to the basic nature
17 of the injuries giving rise to the claims. (Dkt. 289 at 2-
18 3.)
- 19 • Denied the government's motion to preclude evidence of
20 defendant Girardi's post-scheme mental condition to the
21 extent such evidence was relied on by Dr. Chui and reflects
22 upon what defendant's mental status was during the relevant
23 time period. (Id. at 4.)

27 ³ As referenced above, the Court severed the trials of defendant
28 Girardi and Kamon. The Court also denied defendant's motion to
suppress evidence obtained from the Girardi Keese bankruptcy trustee.
(Dkt. 299.)

- Granted the government's motion to admit evidence of defendant Girardi's misappropriation of settlement funds. (Id. at 5-6.)

III. LEGAL AND EVIDENTIARY ISSUES

A. Embezzlement and Misappropriation

The government intends to prove at trial that the fraudulent scheme involved, among other things, embezzling and misappropriating settlement money that defendant Girardi was supposed to be holding in trust for his clients. In an embezzlement scheme, the earliest point at which the government must prove fraudulent intent is the point at which the defendant converted to his own use funds he was supposed to be holding in trust. The "concept of fraud includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another." Carpenter v. United States, 484 U.S. 19, 27 (1987) (internal quotations omitted). Thus, even if defendant Girardi did not possess a fraudulent intent when he received money that he was supposed to hold in trust, "his fraudulent appropriation of the funds still satisfies the elements of § 1343." United States v. Jones, 472 F.3d 1136, 1140 (9th Cir. 2007).

Furthermore, the crime of embezzlement is complete when the misapplication or embezzlement occurs. See, e.g., United States v. Coin, 753 F.2d 1510, 1511 (9th Cir. 1985). Similarly, the crime of fraud is committed when a defendant asserts false representations or omits material facts, with the intent to defraud or deceive, in order to obtain the money or property of another. See United States v. Oren, 893 F.2d 1057, 1061 (9th Cir. 1990); United States v.

1 Treadwell, 593 F.3d 990, 996-98 (2010), overruled on other grounds by
2 United States v. Miller, 953 F.3d 1095 (9th Cir. 2020).

3 **B. Business Records**

4 As stated above, the parties have entered a stipulation
5 regarding the admissibility of the vast majority of the government's
6 exhibits. To the extent the government seeks to admit additional
7 exhibits absent a stipulation that were obtained from various
8 institutions as self-authenticating business records pursuant to
9 Federal Rule of Evidence 902(11), those records should also be
10 admissible.

11 Records that are accompanied by a 902(11) certification are not
12 only self-authenticating, they also fall within an exception to the
13 rule against hearsay if the following conditions are met:

14 (1) "[T]he record was made at or near the time by - or from
15 information transmitted by - someone with knowledge";

16 (2) [T]he record was kept in the course of a regularly conducted
17 activity of a business [or] organization";

18 (3) "[M]aking the record was a regular practice of that
19 activity"; and

20 (4) "[T]he opponent does not show that the source of information
21 or the method or circumstances of preparation indicate a lack of
22 trustworthiness."

23 Fed. R. Evid. 803(6).

24 Because Rule 803(6) represents a firmly rooted hearsay
25 exception, if non-testimonial evidence meets the requirements for
26 admission under the Rule, no further showing of reliability is
27 necessary for admission under the Confrontation Clause. See Ohio v.
28 Roberts, 448 U.S. 56, 66 (1980), overruled on other grounds by

1 Crawford v. Washington, 541 U.S. 36 (2004); United States v. Ray, 930
2 F.2d 1368, 1371 (9th Cir. 1990).

3 Computer printouts that are compilations of data regularly
4 maintained by a business, such as printouts from a bank's internal
5 systems that the bank maintains in the ordinary course of its
6 business, are admissible as records of regularly conducted activity
7 pursuant to Fed. R. Evid. 803(6). See United States v. Catabran, 836
8 F.2d 453, 458 (9th Cir. 1988) (questions as to accuracy "of business
9 records, would have affected only the weight of the printouts, not
10 their admissibility."); U-Haul Int'l v. Lumbermans Mutual Casualty
11 Co., 576 F.3d 1040, 1043-44 (9th Cir. 2009) (computer records kept in
12 the regular course of business activity properly admitted under Fed.
13 R. Evid. 803(6)).

14 Statements within emails can themselves be business records, but
15 those statements need to satisfy the requirements of Fed. R. Evid.
16 803(6). See Ray, 930 F.2d at 1370; Arthur v. Gallagher Bassett
17 Servs., Inc., No. CV 09-4882 SVW (CWX), 2010 WL 11596468, at *6 (C.D.
18 Cal. June 1, 2010) ("There is some authority for admitting emails as
19 business records").

20 In determining if these foundational facts have been
21 established, the court may consider hearsay and other evidence not
22 admissible at trial. See Fed. R. Evid. 104(a); Bourjaily v. United
23 States, 483 U.S. 171, 178-79 (1987).

24 **C. Potential Defenses**

25 1. Defendant Girardi's Cognitive Impairment

26 The issue of defendant Girardi's mental status has been
27 extensively litigated in this case. The Court's pretrial rulings on
28 the testimony of Dr. Chui and Dr. Darby regarding defendant's mental

1 state and the admissibility of his post-scheme mental condition have
2 limited the scope of any such testimony at this trial. Specifically,
3 evidence of defendant Girardi's post-scheme mental state is only
4 relevant to the extent it bears on his knowledge and intent at the
5 time of the alleged scheme. Any mental condition evidence that falls
6 outside that scope, or addresses other aspects of the trial, or the
7 defendant's character, should be excluded. Similarly, subject to the
8 above rulings, any additional evidence that the defense seeks to
9 introduce related to defendant's actions and intentions after the
10 criminal acts is irrelevant to the crimes committed and otherwise
11 inadmissible under Rule 403.

12 2. Evidence of Kamon's Side Fraud Scheme

13 Defendant Girardi has stated his intention to place blame for
14 the entirety of the charged scheme on co-defendant Kamon, and the
15 Court has ruled that evidence of Kamon's side fraud (charged in CR
16 23-24-JLS) and flight from prosecution is intrinsic to this scheme
17 and thus admissible at trial. (Dkt. 302; Dkt. 289 at 6-8.)

18 In light of the Court's statements at the final status
19 conference that it may modify or further clarify these rulings, the
20 government will raise any potential objections to the trial
21 presentation of evidence related to Kamon's side fraud scheme on Rule
22 403 grounds, and any other applicable grounds under the Federal Rules
23 of Evidence as the trial progresses. Since Kamon has been severed
24 for trial, the government is not seeking to introduce evidence of
25 Kamon's side fraud in its case-in-chief.

26 The government has consistently maintained that it will present
27 its case efficiently and will focus on the charged executions
28 identified in the indictment. That said, the government has also

1 consistently maintained that it reserves the right to present
2 additional evidence to rebut any defense theories at trial. While
3 the government does not presently intend to introduce evidence of
4 additional defrauded victims, it reserves the right to present
5 additional testimony and/or documentary evidence that defendant
6 Girardi's misappropriation of settlement funds predated defendant
7 Kamon's role as CFO.

8 3. Attempts at Post-Theft Mitigation Is Not a Defense to
9 Wire Fraud

10 There is no dispute that during the scheme timeframe, defendant
11 Girardi transferred tens of millions of dollars of his own money into
12 the Girardi Keese trust accounts further evincing his misuse of these
13 accounts. At the June 20 motions hearing, counsel for defendant
14 Girardi acknowledged that "Girardi had a significant amount of his
15 own personal money also swimming around in these [trust] accounts."
16 (Dkt. 228 at 23:8-10.) The indictment alleges that defendant, as a
17 member of the California State Bar, was obligated to comply with the
18 California Rules of Professional Conduct applicable to attorneys,
19 including requirements related to the safekeeping of client funds in
20 his law firm's client trust accounts. (Dkt. 1 ¶ 1(e).) Those rules
21 are clear that no funds belonging to an attorney are allowed to be
22 commingled with client funds in a client trust account, except in
23 very limited circumstances (none of which apply here). See Cal. R.
24 Prof. Conduct 4-100. To the extent defendant claims that his
25 transfer of his personal funds into the trust account is exculpatory
26 evidence, he is mistaken and he should be precluded from making any
27 such argument.

1 The parties have proposed a jury instruction based on United
2 States v. Molinaro for the premise that a good faith belief in the
3 truth of a misrepresentation negates criminal intent; however, "a
4 defendant's belief that the victims of the fraud will be paid in the
5 future or will sustain no economic loss is no defense to the crime."
6 11 F.3d 853, 863 (9th Cir. 1993). (See Dkt. 310 at 115.) This is an
7 accurate statement of the law in the Ninth Circuit and accounts for
8 the principle that defendant's transfer of his personal funds into
9 his law firm's bank accounts to pay back clients whom he had
10 defrauded is not a defense to the charged crimes.

11 Furthermore, as discussed in the previous section, should
12 defendant claim that his transfer of personal funds into the Girardi
13 Keese bank accounts evinces a lack of intent to defraud because it
14 was done merely to plug holes in the Girardi Keese account balances
15 caused by Kamon's side fraud, he opens the door to additional
16 rebuttal evidence of defendant's misappropriation and embezzlement of
17 client funds for improper expenditures prior to the charged scheme.

18 4. Victim Negligence is Not a Defense

19 Any attempt by defendant Girardi to fault his clients for
20 delayed payment of their settlements should be excluded. For
21 example, defendant sent several lulling letters to Client 1 and his
22 family falsely stating that both he and Justice Panelli, the former
23 state supreme court justice who mediated Client 1's case, had
24 concerns that providing Client 1 with large sums of money would be
25 harmful because Client 1 might not spend it wisely. However, a
26 victim's negligence, carelessness, or even foolishness is not a
27 defense to a fraud charge. The laws against fraud are designed to
28 protect naive and careless victims just as well as experienced and

1 careful ones. See United States v. Lindsey, 850 F.3d 1009, 1015 (9th
2 Cir. 2017). In fact, the “lack of guile on the part of those
3 solicited may itself point with persuasion to the fraudulent
4 character of the [scheme].” Id. (quoting United States v. Ciccone,
5 219 F.3d 1078, 1083 (9th Cir. 2000)). Defendant Girardi should not
6 be allowed to assert that his lies to his clients about the safety
7 and availability of their settlement funds were somehow justified
8 because the lies were made for the purported benefit of the client.

9 **D. Summary Exhibits and Summary Witness**

10 This case involves a large number of documents, including
11 voluminous financial and law firm records. To assist the jury’s
12 understanding of the case, the government intends to present various
13 charts and summaries that will aid the jury in understanding the
14 evidence, including exhibits that show the flow of money in and out
15 of the Girardi Keese client-trust accounts and other bank accounts
16 related to the charged client cases, as well as charts showing
17 defendant’s embezzlement and misappropriation of those funds. The
18 government has provided defendant Girardi draft copies of these
19 charts pursuant to a draft summary chart agreement which precludes
20 Girardi from using draft versions of the charts during cross
21 examination. The government is in the process of finalizing these
22 charts and will provide final versions to defendant Girardi prior to
23 trial. Defendant Girardi has advised the government that he does not
24 object to many of the charts but has stated objections to certain
25 others. To the extent the parties cannot come to an agreement on
26 admissibility, the government will raise the issue with the Court
27 outside the presence of the jury prior to seeking admission of the
28 charts into evidence.

1 A summary chart may be admitted as substantive evidence when the
2 proponent establishes that the underlying documents upon which the
3 summary is based are voluminous, admissible, and available for
4 inspection. United States v. Johnson, 594 F.2d 1253, 1255-56 (9th
5 Cir. 1979). Although the materials underlying the summary must be
6 admissible, they need not themselves be admitted into evidence.
7 United States v. Rizk, 660 F.3d at 1125, 1130-31 (9th Cir. 2011);
8 United States v. Scales, 594 F.2d 558, 563 (6th Cir. 1979) (affirming
9 introduction of summary charts presenting an organization of
10 undisputed objective evidence in terms of relevant counts of the
11 indictment). Any contention that the chart may contain inaccuracies
12 or omissions goes to the weight of the evidence, not its
13 admissibility. Rizk, 660 F.3d at 1131 at n.2.

14 Rule 1006 does not require that a jury's examination of the
15 underlying records be literally impossible before a summary or a
16 chart may be utilized. "All that is required for the rule to apply
17 is that the underlying writings be 'voluminous' and that in court
18 examination not be convenient." Scales, 594 F.2d at 562. Where a
19 chart does not contain complicated calculations that would require an
20 expert for accuracy, authentication of the chart requires only that
21 the witness (1) have properly catalogued the exhibits and records
22 upon which the chart is based; and (2) have knowledge of the analysis
23 of the records referred to in the chart. Id.; see Goldberg v. United
24 States, 789 F.2d 1341, 1343 (9th Cir. 1986) (upholding district
25 court's determination that the testimony of a revenue agent as to
26 summaries of voluminous tax records did not include any expert
27 opinions or conclusions).

1 Finally, summary charts need not contain the defendant's version
2 of events. See Barsky v. United States, 339 F.2d 180, 181 (9th Cir.
3 1964) (rejecting defendant's argument that summary should be excluded
4 because it did not contain his version of the case; accepting that
5 argument "would be to hold that if a defendant had an alibi, no
6 matter how improbable, then no expert could prepare a summary of the
7 evidence tending to prove guilt").

8 The government will seek to admit these charts through its
9 summary witness IRS Special Agent Ryan Roberson. A summary witness
10 may properly testify about, and use a chart to summarize, evidence
11 that is voluminous and complex. The court and jury are entitled to
12 have a witness "organize and evaluate evidence which is factually
13 complex and fragmentally revealed." United States v. Shirley, 884
14 F.2d 1130, 1133-34 (9th Cir. 1989) (agent's testimony regarding her
15 review of various telephone records, rental receipts, and other
16 previously offered testimony held to be proper summary evidence, as
17 it helped jury organize and evaluate evidence; summary charts
18 properly admitted). Further, a summary witness may be assisted by
19 others in the preparation of summary evidence; the assistance
20 provided by other people in the preparation of summary evidence goes
21 to its weight, not its admissibility. See United States v. Soulard,
22 730 F.2d 1292, 1299 (9th Cir. 1984) (finding summary witness
23 "Soulard's arguments on the motion went to the weight of the
24 evidence, not to its admissibility.").

25 **E. Reciprocal Discovery**

26 On July 27, 2024, defendant Girardi produced voluminous
27 discovery (totaling approximately 50,000 pages) to the government
28 pursuant to the government's requests for reciprocal discovery to

1 which it was entitled under Rules 16(b) and 26.2 of the Federal Rules
2 of Criminal Procedure. This production roughly a week before trial
3 does not identify any specific exhibits that defendant seeks to use
4 at trial and amounts to a "data dump" that does little to ensure that
5 the trial focuses on matters related to the charged cases and
6 conduct. Under the parties' evidentiary stipulations all materials
7 obtained from the Girardi Keese bankruptcy trustee are admissible
8 against a hearsay exception (with rights reserved to object under
9 Rules 401 and 403) (see Dkt. 311 ¶ 1); however, this defense
10 production does nothing to streamline issues for trial and does not
11 comport with the spirit of the reciprocal discovery rules. Based on
12 defense counsel's communications with the Court on the day of this
13 filing, we understand the defense "will have the vast majority of
14 [its] exhibits ready on the first day of trial and will provide as
15 much specificity" as they can before then. The government asks that
16 the defense be ordered to provide its narrowed exhibits on or before
17 the first day of trial.

18 Furthermore, as noted in defendant's discovery production
19 letter, defendant's production has not been filtered for any
20 potential privilege that might be held by defendant Girardi in a
21 personal capacity. This essentially puts the onus on the government
22 to act as gatekeeper for defendant's personal privileges and risks
23 needless delay in determining whether such evidence is admissible.
24 Nevertheless, if the government becomes aware of any privileged
25 materials, it will either destroy or return them to defendant and
26 will not seek to use them at trial.

27 To the extent defendant Girardi attempts to introduce or use any
28 evidence at trial that he has not produced to the government, such

documents should be excluded. See Taylor v. Illinois, 484 U.S. 400, 415 (1988) (defendant's failure to comply with, or object to, government's discovery request before trial justified exclusion of unproduced evidence).

Other than defendant Girardi's reliance on the cognitive impairment argument, defendant has not indicated an intent to raise affirmative defenses. Thus, if he raises previously unmentioned affirmative defenses during the trial, the government reserves the right to object and request that the Court exclude the defendant's undisclosed affirmative defenses.

IV. CONCLUSION

The government respectfully requests leave to file supplemental trial memoranda before or during trial, as may become appropriate.

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Respectfully submitted,

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